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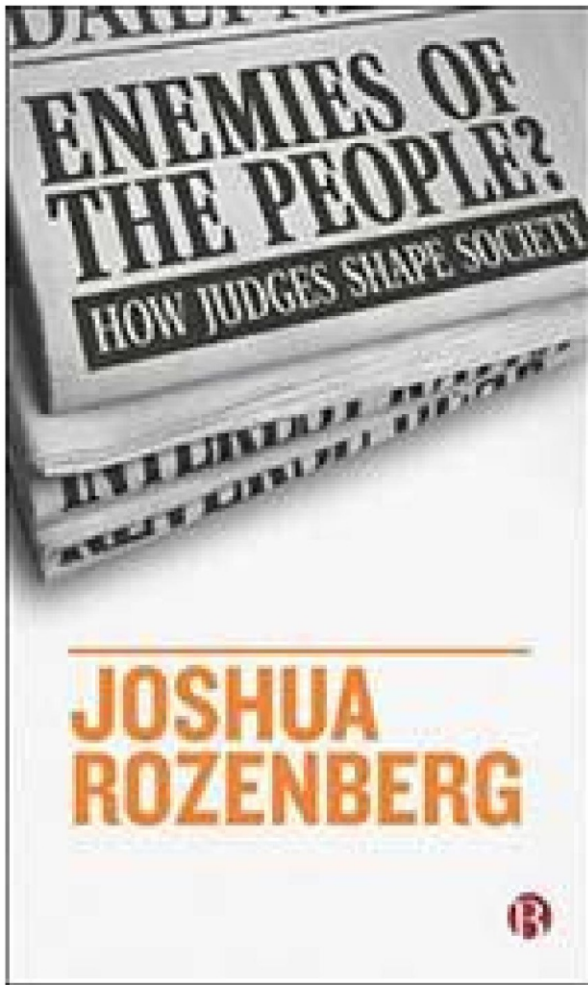
Lord Thomas of Cwmgiedd

**Are they really
enemies of the people?**



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Are they really enemies of the people?



The banner headline in the Daily Mirror caused a furor not only in the UK but also in the Commonwealth where English law is practiced. The statement was an indecent and a gross assault on the independence of Judiciary. It also damaged the public diplomacy of the United Kingdom at a time other countries are making frantic efforts at boosting their public diplomacy image. London is an international center and why it became such a celebrated city was because of the huge role the British judiciary played over a long period of time and the great respect for the British justice system. The common law of course is an edifice built by the English judges and has since then been bolstered by its importance and significance by law academics. The British legal precedents are now part of diplomatic law. The judicial precedents are quoted cases involving Customary International Law by the International Court of Justice (ICJ in the Hague Netherlands) No court of law can depart

from the established principles of English law jurisprudence though in some cases comparative law has been incorporated into diplomatic law. In an interview with BBC Lord Neuberger a sitting judge of the UK Supreme Court commented that the statement did have a deleterious impact on the judiciary and it also in effect undermined the rule of law. He further described judges as being the 'ultimate guardians' of it. There is a fundamental issue in the analysis of the Judgment of then Lord Chief Justice – now Lord Thomas of Cwmgiedd - by the media as he asserted that Government could not trigger Article 50 without an express authority from the Parliament. It was a bench of three judges.

One must look into the entire system of British constitutional history where Parliamentary Supremacy has been invoked. The Brexit issue was a highly charged political question at the time and had to be determined by the Judiciary in an ambience in which Lord Chief Justice had to make an opening remark during the hearing that "We have in this country a civilized way of dealing with things, and it is simply wholly wrong for people to be abusive of those who seek to come to the Queen's courts. If this conduct continues, those who do it must appreciate that the full vigor of the law will be used to ensure that access to Her Majesty's courts is freely available to everyone". This statement by the Lord Chief Justice on the behavior of the British public was reflective of a deep desire to see a misplaced positive outcome from the Courts. This was a mistake on the part of the media institutions. The role of media should have played a pivotal role in educating the British public instead of commenting on the intricacies of the British justice system such as the likely outcome from Judges in view of the existing legal precedents. The British media should engage in providing the best possible argument for public consumption. Perhaps expert legal opinion through Op-Eds should have been resorted to. The Editors of the Daily

Mail should have been extra careful in choosing the words as it smacks of a political campaign in favour of the ruling government. The subsequent actions of the Theresa May government point to that direction.

The public opinions cannot reconcile with the dictates of the judiciary. There is always a clash between Peter Drunk and Peter Sober because both cannot be on the same page at any given time. That's why the Upper Chamber (House of Lords or Senate) is there to filter or modify legislation introduced at the spur of the moment without much regard to wider ramifications. The judicial interpretation of the law is consistent with centuries old precedents and judicial interpretation cannot simply be predicated upon the prevailing mood of the society especially in the British parliamentary tradition. In this context the aftermath of the Brexit referendum. Whereas constitutional jurisprudence in the United States has departed from Parliamentary supremacy in the traditional British sense but in the United States only the Constitution must be upheld. Still there are current political debates in the United States over the efficacy and validity of some of the landmark judgments affecting the people. There are constitutional theories developed over the years and they are unique to American constitutional jurisprudence. The British constitutional interpretations are grounded on common law more in tune with the theories propounded by Albert Dicey. The last debate on Parliamentary Supremacy was raised at a time when the British Parliament enacted 'ouster clauses' ousting the jurisdiction of the British courts to determine or sit in judgment of the decisions of the British government through parliamentary enactments. *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 which

is also relevant to the Privacy International ouster clause litigation. The moot point is does the parliament have the right to prevent the British courts from reviewing a decision made by an administrative authority. If the decision of the authority had been made in error it would throw the whole parliament into a non-entity because its laws have no meaning when the Government interprets law according to their whims and fancies. This proves that judicial review is a necessary concomitant within the sense of parliamentary supremacy. Prof. Christopher Forsyth posited very cogently in one of the articles in the Cambridge Law Journal (2009) titled 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' – this is an academic work that must be read by legal community, civil society activists and media personnel to glean a wide perception on the real ambit of the British constitutional tradition. The Enemies of the People also brought forth a book by a renowned journalist Joshua Rozenberg QC(Hons) titled 'Enemies of the People?: How Judges Shape Society' published by Policy Press (2020) in which Rozenberg defended the interest of the integrity of the British judicial system. Rozenberg had captured the essence of the British justice system in a classic legal sense and had extensively quoted key judicial pronouncements by law Lords. A reading well chronicles to provide the reader with a broad perspective. We believe that the controversy over the Daily Mirror banner headline 'Enemies of the People' must be reviewed by a Royal Commission in terms of the relationship between Media and the Judiciary and accurate reporting is one thing and casting aspersions and ridiculing the judiciary are altogether quite another. A line must be drawn otherwise it would undermine the

centuries old British common law tradition which is not only unique to UK but to wider Commonwealth.

Though Britain is struggling with the absence of a written constitution it has departed significantly from the centuries old practice since becoming a member of the EU and adopting the adoption of ECHR. The Constitutional Reform Act of 2005 did have a direct bearing on the separation of powers doctrine which is strictly enforced in countries where constitutional law triumphs. **The State v Makwanyane and Another (CCT3/94) [1995] ZACC 3** was a case in point where the South African Supreme Court differed significantly from the public opinion. The public opinion is formed through media and if there is any lacuna in reporting facts to the people and if the media are influenced by political actors the informed judgment of the public could be misconstrued compared to judicial reasoning based on solid legal principles and precedents taken from the comparative jurisprudence and from British common law tradition. The issue before the British public now is a clear set of standards in black and white that the defence of the judiciary remains fundamental to the British system of justice. The judiciary is unable to defend itself against unfair, personal or threatening abuse however it is incumbent upon the Lord Chancellor to intervene promptly and publicly to defend the judiciary against targeted personal criticism unfairly impugning impartiality of Judges or casting aspersions against the members of the Judiciary. The 'Enemies of the People' incident caused furor in the judiciary as Judiciary is bound to perform its duty without fear or favour therefore it needs a Lord Chancellor who is willing to defend it, and with sufficient authority to do so. However a review of the entire gamut of relations between Median and Judiciary must be worked out by a Royal Commission. This is a matter for the British Government.

UTILITY OF INVOKING ROYAL PREROGATIVE The royal prerogative is an exercise invoked by the government to bring in the authority of the monarchy thus bolstering the validity of an executive action. Royal prerogatives did have its hey days prior to British entry into EU in 1972 however with the passage of UK Human Rights Act, the UK judiciary underwent a radical change and had to drop some of the common law jurisprudence in preference to dictates of the Strasbourg jurisprudence. Prof Robert Hazel of the University of College London has examined in detail the validity and effectiveness of royal prerogative in his book 'Executive Power; The Prerogative, Past, Present and Future' published by UCL which provides a detail account of the history and its current relevance in the backdrop of **R (Miller) v Secretary of State for Exiting the European Union (Miller I and Miller II)** litigation.

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